United Nations CCPR/C/SR.2431

International Covenant on Civil and Political Rights

Distr.: General
17 April 2007

Original: English

Human Rights Committee
Eighty-ninth session

Summary record of the 2431st meeting
Held at Headquarters, New York, on Thursday, 15 March, at 3 p.m.

Chairperson: Mr. Rivas Posada

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07-27082 (E)

The meeting was called to order at 3.05 p.m.

Organizational and other matters (*continued*) (HRI/MC/2007/5 and HRI/MC/2007/2)

Report of the meeting of the working group on reservations (HRI/MC/2007/5)

1. **Sir Nigel Rodley** presented the report of the meeting of the working group on reservations (HRI/MC/2007/5). The working group had met for a second time in Geneva on 14 and 15 December 2006, because representatives of two of the committees particularly concerned by the issue of reservations, the Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination Against Women, had not been present at the first meeting. At the December meeting, representatives of those Committees had made presentations on their own practice, which had been missing from the proceedings of the first meeting.

2. There had followed a general exchange of views, including consideration by all the committees of the recommendations contained in the report of the previous meeting (HRI/MC/2006/5/Rev.1). He recalled that the Human Rights Committee had had some problems with the recommendations that had come out at the previous meeting, particularly recommendation 6. In the light of the International Law Commission's *travaux préparatoires*, some members were concerned that the previous meeting had described as constituting a step forward the criteria for determining the validity of reservations contained in the draft methodological guidelines set out in the tenth report of the Special Rapporteur of the International Law Commission on reservations to treaties (A/CN.4/558/Add.1). The text of the recommendation had therefore been changed to note the potential significance of the criteria.

3. The Committee's main concern was the way in which the working group at its first meeting had dealt with the issue of the legal effect of reservations that could be incompatible with a given treaty, particularly its object and purpose. It had been argued that there would be a rebuttable presumption that the treaty in question would continue to apply. That was considered to be a substantial weakening, however, of the position set out in the Committee's general comment No. 24, which took the view that normally a treaty would continue to apply without the benefit of the reservation. The meeting had not quite adopted the wording of the Committee in its reservation, not least because it would not have added much and because it neither defined nor specified the consequences of abnormality. The meeting had therefore built on a statement already put before the International Law Commission by its Special Rapporteur, who had taken the view that an invalid reservation was to be considered null and void. Therefore, recommendation 7 stated that a State would not be able to rely on such a reservation and, unless its contrary intention was incontrovertibly established, would remain a party to the treaty without the benefit of the reservation.

4. The other novelty in the report was in recommendation 9, which essentially built on what had been the second sentence of recommendation 8 of the previous report and which gave guidance to the committees on how to approach reservations. The recommendation largely reflected the Committee's practice. It was based on a draft proposed by the secretariat, which was anxious to get the other committees to fall into the predominant practice of the Human Rights Committee. Nothing in recommendation 9 was inconsistent with Committee practice.

5. Lastly, he drew attention to recommendation 10, in which the working group recommended that the inter-committee meeting and the meeting of chairpersons of the human rights treaty bodies should decide whether the working group should convene another meeting to take into account the reactions and queries of treaty bodies in respect of its recommendations and any further developments in the International Law Commission on the subject of reservations to treaties. It seemed premature at the present stage to consider whether to hold a future meeting of the working group before the May 2007 meeting of representatives of each of the treaty bodies and the Commission.

6. **Ms. Wedgwood** (United States of America) said that there were significant differences between recommendation 7 contained in the report of the meeting of the working group on reservations held in June 2006 (HRI/MC/2006/5/Rev.1) and the revised recommendation 7 in the current report. The recommendation put forward at the previous meeting stated that the consequence that applied in a particular situation depended on the intention of the State at the time at which it had entered its reservation. It further stated that that intention must be identified in a serious examination of the available information, with the

rebuttable presumption that the State would rather remain a party to the treaty without the benefit of the reservation than be excluded. The revised recommendation stated that a State would not be able to rely on an invalid reservation and, unless its contrary intention was incontrovertibly established — a very high standard — would remain a party to the treaty without the benefit of the reservation.

7. An incontrovertibly demonstrated intention, however, was a standard that was almost impossible to meet. It seemed that the practice of the Committee in recent years had been to avoid the issue of reservations and interpret general comment No. 24 broadly. She therefore noted with surprise the unremitting adverb "incontrovertibly" and would welcome further clarification on the recommendation.

8. In Communication No. 1008/2001, the author had asserted her right to succession to the ranks and titles held by her father as the firstborn daughter and claimed to be a victim of violations of the Covenant by Spain. Spain had taken a reservation to the Convention on the Elimination of All Forms of Discrimination against Women, stating that the Crown was exempt from any norm of gender equality. However, Spain had not taken a similar reservation to the Covenant, because at the time at which it had acceded to the Covenant, the Committee was not reading article 26 with as much breadth as at present. One problem with the progressive development or interpretation of the law was that reservations could be made only at the time of accession to the treaty. While the Committee did not favour reservations, dynamic interpretations of treaties might create pressures for a dynamic doctrine of reservations. If article 26 of the Covenant was to be read as reflecting the Convention on the Elimination of All Forms of Discrimination against Women, then the Committee should give consideration to Spain's manifest intention and its reservation, regardless of whether it was attached to a different treaty.

9. **Mr. Shearer** wondered whether the Committee's general comments had previously dealt with the issue of very broad reservations to treaties. While it was not a problem for the Covenant, under certain other international human rights conventions, including the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child, several States had entered some extremely broad reservations. A State party's acceptance of a convention might be subject to the provisions of its constitution or religious law or the Koran, to mention a few examples. It was unclear whether in such cases the reservations were void for uncertainty. He would welcome further discussion on the approach to be taken to reservations of that kind.

10. **Mr. O'Flaherty** said that it was unclear what form of interaction would take place at the meeting of the International Law Commission with treaty bodies mentioned in paragraph 2 of the report. He would like to know whether the existing working group would be reconvening or whether some other format was envisaged. In connection with paragraph 4, reference had been made to the International Court of Justice judgement on the case of *Armed Activities on the Territory of the Congo* (*Democratic Republic of the Congo v. Rwanda*) and to concerns that it appeared to limit the role of the Committee in determining the validity of reservations. He would appreciate further information on the extent to which the working group had considered the need to specifically address that development in its own report. Recommendation 6 of the report, setting forth an autonomous set of criteria for determining the validity of reservations, would appear implicitly to be inconsistent with the logic of the Court decision. He would be interested in hearing about the extent to which the issues raised by the judgement were being specifically addressed by the working group. Lastly, he took issue with the suggestion in paragraph 12 of the report that the Committee was less inclined to consider the validity of reservations in the context of reviews of periodic reports, as that conclusion was based on a single case.

11. **Ms. Motoc**, referring to the aforementioned judgement, asked whether the working group had discussed the joint separate opinion of Judge Higgins, Judge Kooijmans, Judge Elaraby, Judge Owada and Judge Simma, which referred to the Committee's general comment No. 24.

12. **Ms. Chanet**, noting with appreciation the current report's revised recommendations concerning reservations to treaties, said that it posed far fewer problems for her than the previous text. The International Law Commission would take time before it could adopt a final text on the validity of reservations under international law, and the situation concerning reservations was not yet firmly established. The Committee must not fall short of the proposal mentioned in the recommendation of the Special Rapporteur of the International Law Commission.

Furthermore, the Committee's interpretation of treaty obligations should not differ from those of States, which might be more concerned with State sovereignty than human rights with respect to reservations. Efforts to find agreement with the Special Rapporteur were therefore particularly welcome.

13. **Sir Nigel Rodley** said that the wording of the previous text of recommendation 7 had been universally criticized within the Committee as being much too weak. The text had been revised accordingly to reflect what he took to be the understanding of the Committee. The fact that the Committee had avoided reservations issues generally was beside the point. That issue was addressed in recommendation 9. The Committee did not, of course, make a point of taking up reservations for their own sake. No Committee saw the need for confrontation, especially within the context of periodic reviews, where dialogue was particularly important. Reservations should be considered when a confrontation was inevitable, for example in dealing with individual cases. Another such circumstance might be fact-finding inquiries under the procedure outlined in article 20 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women. That would also be true for the Committee on Enforced Disappearances. Under such circumstances, the Committee must be aware of the State's obligations and the State's view on those obligations. The norm put forward in the recommendations concerning reservations was intended to constitute the basis on which the Committee would address such a situation of confrontation.

14. The issue of inconsistent reservations was addressed in paragraph 9. No treaty body would feel obligated to pay attention to a reservation made to a treaty other than its own. In such circumstances, the position that there was no reservation should prevail.

15. The working group had not directly discussed broad and vague reservations. While there were few such reservations to the Covenant, there were many to the Convention on the Elimination of All Forms of Discrimination against Women, for example. The working group did not consider the issue to be controversial. In addition, vague and general reservations had been discussed in the report of the Special Rapporteur (paras. 107-115).

16. Concerning the forthcoming May 2007 meeting between the International Law Commission and treaty bodies, it was for the Committee to decide who would be sent. The Committee was in no way bound by virtue of the fact that he had been appointed to represent it at the two sessions of the working group.

17. Concerning the issue relating to the case of the Democratic Republic of the Congo, there had been no follow-up, because it only affected the International Convention on the Elimination of All Forms of Racial Discrimination, which had a numerical determinant as to whether or not a reservation was consistent with its object and purpose. It was extremely unfortunate that the International Court of Justice had decided to interpret the relevant provision of the Convention as narrowly and literally as it had. Although the working group had discussed the judgement, it considered that the issue was beyond its scope and that addressing it would not be helpful. It also bore in mind the Court's attitude towards criticisms by other bodies in the international system, as was shown in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Bosnia and Herzegovina v. Serbia and Montenegro*).

18. With regard to the statement in paragraph 12, it was his belief that the Committee might be less inclined to come to the conclusion that a reservation was valid in the context of the review of periodic reports. If he was mistaken, no particular consequences would result from it, as there had been only one instance in the previous 12 years when the Committee had decided within the context of a review of periodic reports that a reservation was incompatible with the object and purpose of the treaty.

19. Lastly, he concurred with Ms. Chanet that the Committee's previous position was out of line with the currently evolved position of the Special Rapporteur, which had developed considerably since the time of the first report of the working group. He hoped that the International Law Commission would agree with the Special Rapporteur when the time came to finalize the text on legal consequences of the invalidity of a reservation.

20. **Mr. Gillibert** (Secretary of the Committee) gave some details of the proposed International Law Commission meeting. A letter had been sent to all treaty bodies, inviting each of them to send one representative to a discussion of issues relating to

human rights treaties. The meeting would take the form of an exchange of views between members of the International Law Commission and human rights experts. Discussion would focus, inter alia, on the preliminary conclusions adopted in 1997 by the International Law Commission on reservations to normative multilateral treaties, including human rights treaties; other issues relating to reservations to human rights treaties, for example the effect, if any, of reservations incompatible with the object and purpose of the treaty; or consequences of the findings of human rights treaty bodies.

21. **Ms. Wedgwood** stressed that there was a triadic relationship among the Committee, the International Law Commission and States parties. The fact that the Committee was now in agreement with the views of the Special Rapporteur of the International Law Commission did not necessarily mean that States would not have views of their own.

22. The assumption that the appropriate standard was "incontrovertible intent" raised the issue of how that incontrovertibility could be proved. Furthermore, if the standard that the Committee was now proposing had not been clear as a matter of law at the time that most States had acceded to the treaty and expressed their reservations, States might not have thought to establish the litigation record that would be desirable for an easy diagnosis of incontrovertible intent. If the Committee was going to demand incontrovertible intent and, at the same time, rule out the relevance of any post-ratification, post-reservation statements by the State party, it would be virtually impossible for a State to meet the standard.

23. Additionally, it was hard to have a segregated corpus of reservation law. That would affect the way that reservations were regarded, not only for human rights treaties, but for others as well. If the predictability of what a State was undertaking, on becoming party to a treaty and expressing a reservation, were to be too severely eroded through dynamic interpretation of the treaty and thus of the State's reservations, it would be hard to persuade parliaments to agree to join treaty regimes.

24. There was currently a major debate on the inherent tension between democracy and international law, and the Committee should not exacerbate that. Making it too difficult for States to rely on the reservations they thought they had made would defeat the intention of having highly inclusive treaty bodies.

25. **Mr. O'Flaherty**, expressing gratitude for the information about the International Law Commission meeting, sought confirmation that the only topic for discussion would be that of reservations. While he fully respected Sir Nigel's response with regard to paragraph 12 of the working group's report (HRI/MC/2007/5), he felt that the Committee should reserve — and protect — its right to consider a reservation invalid in the context of the review of periodic reports, even if it rarely did so in practice.

26. **Mr. Gillibert** (Secretary of the Committee) confirmed that the only topic for discussion at the International Law Commission meeting would be that of reservations.

27. **Ms. Chanet** expressed her support for the formulation in paragraph 12 of the working group's report. In the past the situation had been different, and in cases of countries with extensive reservations, such as those that subordinated treaties to sharia law, the Committee had indeed commented on the validity of such reservations. As Sir Nigel had indicated in paragraph 12, however, it no longer tended to do so.

28. **Sir Nigel Rodley** said that he had nothing to add to Ms. Chanet's remarks on paragraph 12. The working group's report was a reflection of the circumstances he had described, and he hoped that other Committee members did not feel that it bound the Committee to any particular course of action.

29. **Ms. Wedgwood** had been right to draw attention to the reaction of States parties. The Committee did not operate in a vacuum, and had to give consideration to what the position of States might be. Very often, the position of the States was not exactly consistent. Their legal position was not necessarily that of the lowest common denominator, especially if that lowest common denominator was based wholly on a "founding fathers" approach to treaty interpretation as opposed to a "living instrument" approach which did indeed take account of subsequent State practice.

30. It was true that "incontrovertible intent" was a high standard, but in his view it did not represent an attempt to carve out anything special for human rights. The position of the working group, with which everything else was consistent, was outlined in its recommendation 3. The argument for the threshold

notion of incontrovertibility of intent flowed rather from the content of the treaty. It would be extremely rash to assume that if a reservation were incompatible with the object and purpose of the treaty, a State would not be a party to it; thus, the question was essentially what the threshold of proof was.

31. Some States wanted the Committee to take into account subsequent practice when it was negative, but not when it was positive. The Committee had taken a very firm "founding fathers" approach to treaty interpretation in its dialogue with a State party the previous July, having been very much at pains to argue that subsequent State practice had to be taken into consideration, a position that had not been easily digested by the State party in question.

32. States were ultimately the determinants of their own obligations, and it would be best if the Committee could bring them round to its own view rather than staking out a position against them. The Committee should be trying to move States parties away from a position that was not necessarily consistent with the object and purpose of the treaty in question.

33. **Ms. Wedgwood** said that changes in the Committee's standard for judging a State's reservations raised the issue of what was admissible evidence as to the intent of the State. It was a general rule that before dealing with a contentious issue, one built a record of evidence, but since general comment No. 24 had been finalized after the accession of many States to particular treaty instruments, and given that the idea of "incontrovertible intent" was also new, States might not have established the record that they would have wished to if they had known how the Committee would eventually interpret the law on reservations.

34. States parties' statements as to what they believed their intent to have been at the time would have to be thought through in a principled way, particularly as the Committee was not bringing up reservations during the examination of State parties' reports, and might therefore be limited to what the State had said at the time of its ratification of the treaty. It should be possible to demonstrate to States that, even admitting later statements, they could still meet the standard. If a State told the Committee in good faith, however, that at the time it had acceded it had thought that its reservation was a condition of its assent, the Committee should probably accept it rather than ruling it inadmissible a priori. Dynamic interpretation was a process of dialogue.

35. **The Chairperson** said that there might be scope for further discussion of the issue in the context of responding to the invitation from the International Law Commission.

Report of the working group on harmonization of working methods of treaty bodies
(HRI/MC/2007/2)

36. **Mr. Amor**, reporting on the meeting of the working group on the harmonization of working methods of treaty bodies, which he had attended in Geneva on 27 and 28 November 2006 as the Committee's representative together with the six representatives of the other treaty bodies, drew attention to the report of the proceedings drawn up by the secretariat (HRI/MC/2007/2). The opinions he had expressed throughout the meeting had reflected the positions taken by the Committee in document CCPR/C/88/CRP.3/Rev.1.

37. There had been a rich and occasionally intense debate on general issues and on a specific proposal by the Committee on the Elimination of Racial Discrimination. There had been unanimous agreement that a unified standing treaty body — an idea originally put forward by the United Nations High Commissioner for Human Rights — was necessary, but that it was desirable to harmonize the working methods of the treaty bodies.

38. It had been agreed that the mechanism for achieving that would have to be a body representative of the various committees, but opinions differed as to whether it should replace the annual meeting of chairpersons of human rights treaty bodies and the inter-committee meeting or constitute a separate body. He himself had argued for replacement (report, paras. 7 and 13). There had also been no agreement on the composition of the new body, the term of its members, and how often it would meet each year (para. 14).

39. The mandate of the new body, it had generally been agreed, would be to review the methods of considering State party reports and formulating general comments; but representatives had not seen eye to eye on the handling of communications. Views had also varied on the extent of the new body's contacts with the Human Rights Council, although all had agreed

that, at the very least, there should be an exchange of information.

40. The powers assigned to the body needed further discussion: some had argued for merely the power to make recommendations to the treaty bodies, others for actual power to harmonize working methods, and others for intersessional action only.

41. The specific proposal put forward by the Committee on the Elimination of Racial Discrimination — that the individual committees should continue to work separately but that all communications should be centralized under a single complaints body — had generated a good deal of discussion. Initially, the thinking had been that it would be unnecessary, but the representative of the Committee on the Elimination of Racial Discrimination had held doggedly to his position and begun to sway others, although no conclusion had been reached. He himself had spoken frankly against the proposal. His impression was that its proponents underestimated the legal and political difficulties involved, and were not familiar enough with how the Human Rights Committee dealt with communications or with the different kinds of texts involved. The proposal, to his mind, would jeopardize the whole system of receiving communications. If it were adopted, responsibility should be given to the Human Rights Committee, but that was not desirable either.

42. The statistics spoke to how differently each treaty body dealt with communications: the Human Rights Committee devoted 10 to 15 meetings to communications per year, the Committee against Torture 3 meetings, the Committee on the Elimination of Racial Discrimination 1 to 3 meetings, and the Committee on the Elimination of Discrimination against Women 2 to 4 meetings; as to the number of communications received and acted upon, the respective figures were 1,502 received and 1,216 concluded, 305 received and 259 concluded, 38 received and 34 concluded, and 12 received and 6 concluded. The reality of the issue was therefore very different, depending on the committee.

43. Throughout the meeting, he himself had remained very open to the necessity and usefulness of harmonizing working methods, whereas others had seemed suspicious of the idea. And his general impression was that the other committees, while well-disposed to the Human Rights Committee, were somewhat mistrustful of it.

44. The working group was scheduled to meet again during the second week of April 2007.

45. **The Chairperson** said that Mr. Amor had discharged his task well on a developing issue, and asked him to keep the Committee informed of his contacts with the group and his impressions. Many of the proposals under discussion went to the heart of the Committee's work and could seriously compromise it.

46. **Ms. Chanet** said that three salient points emerged from what seemed to have been a turbulent meeting. Since a unified treaty body was clearly unfeasible, the question then became how to ensure the consistency among treaty bodies that had been shown to be lacking in the current system.

47. She was worried about the proposal by the Committee on the Elimination of Racial Discrimination. Its representative's surprising insistence at the meeting seemed to have worked, because some of the other representatives, unconvinced by Mr. Amor's arguments, had gone so far as to suggest the creation of a smaller working group to examine the proposal (report, para. 26). She was amazed that the Committee against Torture was supporting the proposal (report, para. 8). To accept the proposal would be a total dilution of the complaints procedure, an argument to which the Committee on the Elimination of Racial Discrimination turned a deaf ear, as it had to the legal problems involved, for example, that different States parties had acceded to the individual treaties.

48. **The Chairperson** pointed out that the heading preceding paragraphs 22 to 33 of the report read "Preliminary" points of agreement, and in that he saw perhaps some reason for optimism to temper Madame Chanet's pessimism.

49. **Mr. Amor** observed that the report had not been drafted in the course of the meetings, but rather that a text prepared by a member of the human rights secretariat had been circulated for comment later.

50. **Mr. O'Flaherty**, noting that the High Commissioner herself had attended one of the meetings, asked for Mr. Amor's sense of whether she was still fully committed to the ideas she had put forward in her original concept paper, for that might affect the impasse on how to proceed with what was on

the table. Also, he wondered if an intergovernmental conference was still scheduled to take place.

51. In his view, the creation of yet another body to harmonize working methods (report, para. 13) rather than reconfiguring the inter-committee meeting and the meeting of chairpersons would be no solution. Also, the relation of the treaty bodies with the Human Rights Council — treated very weakly in paragraph 24 of the report — was a matter that should be given more urgency, for the Council was moving ahead with its procedures while the treaty bodies discussed it. The Committee should recommend that the inter-committee meeting should put the matter on its agenda in June and invite the head of the Council to attend; and in the meantime, the Committee should formulate its ideas about how the relations in question should develop.

52. **The Chairperson** said that a meeting of treaty body chairpersons was scheduled for 14 and 15 June 2007, in advance of the inter-committee meeting.

53. **Sir Nigel Rodley** said that the secretariat should never be given the responsibility for reporting on the conclusions of a meeting. Committee experts should draft their own report, or there should be no report at all. The Committee should mandate Mr. Amor to take that position and to say that, in the future, the points of agreement must be decided by the participants at the meeting. As it was, the "preliminary points of agreement" in the working group report probably had a status they should not have.

54. He agreed with Mr. O'Flaherty that it was not wise to talk of establishing a new body, a signal for institutional jockeying, rather than reconfiguring the existing bodies. What he did not find in the report was an account of any substantive discussion of proposals for useful new procedures, such as Mr. Amor's proposal that after the initial State party report, the State party responses to the lists of issues could serve in lieu of subsequent reports. The matter had apparently never come up. The Committee should therefore stake out for itself an insistence on having more discussion next time of substantive harmonization issues. Also, Mr. Amor should make it clear that the Committee was against the establishment of a small working group to consider the creation of a unified body for communications (report, para. 26).

55. **Ms. Motoc** said that the Committee's concerns were not exaggerated, because the so-called reform of the United Nations and the human rights bodies seemed to be headed in the wrong direction. She supported Sir Nigel Rodley's proposal that the Committee should officially dissociate itself from the preliminary points of agreement. Mr. Amor, as the Committee's representative, should be mandated to express that position. Indeed, there had been many other working groups that could not reach agreement following their first meeting and hence could not produce a report. For example, that had happened with the working group on the judicial application of economic, social and cultural rights.

56. While agreeing with Mr. O'Flaherty on the usefulness of an institutional relationship between the Council and the Committee, she said it was premature to determine what that relationship would be, given that the Council had not yet decided on the role of special procedures mandate-holders and other subsidiary organs.

57. **Ms. Wedgwood** shared the concerns raised by Mr. Amor and others. The Committee did not control the printing press and yet the document that had been released by the working group appeared to have official status. In the meantime, not much was known about the Committee's communications of dissent. Strong action was therefore needed to stem the tide that had been created by the proposal of the Committee on the Elimination of Racial Discrimination. Moreover, the Council was on thin ice because it could hardly agree on anything, including the reports on Darfur. It was time to plead with the High Commissioner to direct her efforts towards convincing the Council to adopt treaty body recommendations — which were apolitical in nature — as the basis for universal periodic review.

58. **Mr. Schmidt** (Team Leader, Petitions Unit), clarifying the points raised by Mr. O'Flaherty and Ms. Motoc, said that the High Commissioner would probably not insist on pursuing the proposals she had prepared and circulated in her concept paper the previous year, because she knew that the concept was politically unattainable. She herself had admitted as much at meetings with representatives of the regional groups, the donor community and staff in her office and the United Nations Office at Geneva. Even if there was no agreement on a single body, she was pleased to note the ongoing discussions on the harmonization of working methods of treaty bodies to make them more predictable and manageable, ultimately reducing their

reporting burden, and it was for the best that she had not formally withdrawn her proposal.

59. With regard to relations between the Council and treaty bodies, the facilitators of the Council's six working groups had all updated and tabled revised concept and discussion papers, including the revised concept paper on universal periodic review. The linkage between universal periodic review and treaty body procedures had been framed in negative terms, with reference to the need "to avoid at all possible costs" duplication between universal periodic review and the procedures or concluding observations of the treaty bodies. Nevertheless, the debate showed that treaty body outputs and the recommendations of special rapporteurs would ultimately form the basis for consideration of universal periodic review.

60. With regard to working methods, he said that the Human Rights Committee's 2004 decision to consider treating a State party's responses to the list of issues as its next periodic report had been mentioned in most treaty body reform discussions and had been welcomed as a very positive step. It would be up to the Committee to implement that decision.

61. **Ms. Chanet** agreed with Ms. Wedgwood that the problem with the working group's report was that it was being circulated as an official United Nations document, even though it did not reflect the position of all the members of the working group. The challenge for Mr. Amor would now be to ensure that his written objections to the report were transformed into an official United Nations document. As suggested by Sir Nigel Rodley, maybe it should not be left up to the secretariat to draft such a document. However, if it did, then there should be some way of allowing committees to express their objections officially.

62. **Mr. Amor** said that the proposal by the Committee on the Elimination of Racial Discrimination was merely a suggestion made by the representative of that Committee which had been severely criticized and that he himself had rejected it outright. With regard to the coordination body, Mr. Doek, Chairperson of the Committee on the Rights of the Child, had agreed to prepare and present an oral report, not an official document. He himself, as representative of the Human Rights Committee, had also been asked to make an oral presentation on communication procedures. His position was that the Committee was governed by texts that had to be respected, but that it should also consider anything that could help improve harmonization, such as the recording of communications and strengthening of the Secretariat or even discussion on the Committee's perception of preliminary measures. With regard to communication, he saw very few problems apart from the disagreement that had already been raised. He was open to any good ideas that would enhance monitoring, for example.

63. The only problem of substance was that of reservations but he would welcome any suggestions, perhaps along the lines of general comment No. 24, which would allow colleagues to benefit from the Committee's experience. To his knowledge, there was no subgroup charged with studying the proposal of the Committee on the Elimination of Racial Discrimination. He confirmed Mr. Schmidt's assertion that the Human Rights Commissioner would not insist on pursuing her proposal, because she had paid a short visit to the working group and, as he understood it, had indicated clearly that there would not be any single body.

64. As for the intergovernmental conference for the review of the proposed single organ, Mr. Schmidt had provided the appropriate response. With regard to the relationship with the Human Rights Council, many things had been said, some of which had been completely unsubstantiated. The working group had been tasked with providing information, which it had delivered in its final observations. While it was true that the working group's report did not reflect the disagreement between the treaty bodies, the person who had drafted the report, Ms. O'Connor, had done her very best under very difficult circumstances. The report would be presented after the second meeting of the working group and it would be replaced if a suitable formula could be found.

65. On the Committee's perception of the report, he said that he had indicated clearly to the working group that the report did not reflect the Committee's position. With regard to relations with the Council, the Committee was a treaty body and would carry out its mandate until such time as it was modified by the States. He welcomed the comments and explanations provided by the secretariat regarding the single body. He felt that harmonization would be possible with regard to the reports and communications if it made sense.

66. **Ms. Wedgwood** said that it was difficult to distinguish between public and private documents in the United Nations system. She wondered whether the Committee's principled and reasoned position could be published in a document having the same status as the one that was being circulated.

67. **Sir Nigel Rodley** proposed the following text which the Committee could use as the basis for a formal decision: "On the basis of the report of its representative to the working group, the Human Rights Committee concludes that the preliminary points of agreement have no status; in particular the Human Rights Committee does not accept the establishment of a 'small group' for a unified body for communications; it agrees to participate in the next meeting of the working group on the understanding that it will discuss substantive areas of harmonization of procedures, including communications procedures; it instructs its representative to explain and adhere to this decision in the next meeting of the working group; it requests that this decision be included in its own annual report and in the next report of the working group." The ideas and wording could be discussed, but a formal document was necessary to strengthen the hands of the Committee's representative.

68. **Mr. Amor** said that, on closer examination, the proposal by the Committee on the Elimination of Racial Discrimination could not survive and that it did not deserve all the attention it seemed to be receiving. He agreed that the position of the Human Rights Committee should be made public, but felt that the document prepared for that purpose should refer to both the working group report and the report he had issued as its representative, in order to avoid any confusion.

69. **Ms. Motoc** agreed with the proposal for a formal document. In future, if the working group report did not reflect the Committee's position, it should not be adopted. Given the atmosphere in the Council as described by Mr. Schmidt, the Committee's language and actions had to be more direct and not very diplomatic.

70. **Mr. O'Flaherty** said that he did not support a formal decision. The Committee's approach to reform had always been moderate and sensible, making it the leading treaty body for reform. A formal decision expressed in negative terms would look more like an attempt to block action. He agreed with Mr. Amor that the idea should not be given so much importance and that it would die in due course. If the Committee absolutely wanted a decision, then it should emphasize some positive aspects instead of just dwelling on the negative aspects.

71. **Mr. Pérez Sánchez-Cerro** said that the Committee's objection was based not just on the form, in that the secretariat was wrong to have attributed the preliminary points of agreement as a fait accompli to all the committees, but also on the substance. He had not heard any comments from any Committee member in favour of the reform outlined by the High Commissioner. He favoured adopting the document proposed by Sir Nigel Rodley — which should also reflect the report that had been prepared by Mr. Amor, forwarding it to the representatives of all the committees and presenting it at the next meeting.

72. **Sir Nigel Rodley** said that since some of the criticisms being expressed showed that his proposed text had been misunderstood, he would rewrite it and circulate it for consideration. His main bone of contention was with paragraph 26 on the establishment of a small group to examine the substantive elements of a proposal for the creation of a unified body of communications. He was not taking issue with the High Commissioner, but with a document that seemed to reflect agreement in a situation where there was none. He was therefore prepared to propose a gracious but firm text for consideration to reflect the Committee's position.

73. **Ms. Chanet** said that it was important to present the Committee's position on the proposed single body in an official, public document bearing a United Nations masthead and symbol. The document should reflect the Committee's proposals for the discussion on communications and should be drafted in positive terms with regard to the coordination that should take place between treaty bodies.

74. **Mr. O'Flaherty** said that he simply wanted a document that allowed the Committee to make a solid contribution to the reform discussion and to reaffirm it leadership position.

75. **The Chairperson**, summing up the discussion, said that there was general agreement for the Committee to consider producing a document that reflected its position. On behalf of the Committee, Sir Nigel Rodley would prepare a text that could include some positive elements and should cover much

more than just paragraph 26. He agreed that a small group could be tasked with producing a document that expressed support for reform but also established the Committee's dissenting position very clearly.

76. **Sir Nigel Rodley** said that there was no need for a new communication because there was already a text in English that could form the basis for the discussion, and that could be prepared in a closed meeting.

77. **Mr. Schmidt** (Human Rights Committee Secretariat) confirmed that there were texts for two communications in the official languages of the Committee.

The meeting rose at 5.30 p.m.

United Nations CCPR/C/SR.2432

International Covenant on Civil and Political Rights

Distr.: General
11 April 2007

Original: English

Human Rights Committee
Eighty-ninth session

Summary record of the 2432nd meeting
Held at Headquarters, New York, on Friday, 16 March 2007, at 10 a.m.

Chairperson: Mr. Rivas Posada

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Draft general comment No. 32 on article 14 of the Covenant

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07-27229 (E)

The meeting was called to order at 10.10 a.m.

General comments of the Committee

Draft general comment No. 32 on article 14 of the Covenant (CCPR/C/GC/32/CRP.1/Rev.4)

1. **Mr. Kälin**, speaking as Rapporteur for the draft general comment on article 14, said that the Committee would be carrying out its second reading of the draft general comment, the final version of which would, he hoped, be adopted by the end of the current session. He reminded the Committee that it had decided that the comment should be of a technical nature, its purpose being to codify the Committee's extensive case law. A number of States parties had submitted remarks on the draft general comment; however, none had been received from any treaty body until just before the meeting, from the Committee on the Rights of the Child; he would attempt to reflect those remarks to the extent possible in the Committee's discussion. One problem in preparing the draft comment had been the submission of most observations after the deadline, which had nonetheless been clearly announced from the outset. The Committee therefore had two documents before it: the draft general comment (CCPR/C/GC/32/CRP.1/Rev.4) and a paper setting out proposed amendments received after the deadline. Regarding those additional proposals, question marks indicated which points he was not sure were worth incorporating. He had taken the liberty of excluding proposals going beyond the scope of the draft general comment or concerning issues that the Committee had already discussed in detail and on which it had taken a firm position. Those members of the Committee who wished to see a comprehensive list of submissions received after the deadline should contact the Secretariat.

2. For the most part, the observations received had been favourable, requesting clarification or further information rather than stating major concerns. The Committee's stance on various issues appeared to be widely accepted, as the large majority of States parties' submissions had been simply to inform the Committee that their legislation was in line with the Committee's position and that they had no proposals to make. He himself had made some minor proposed changes to the text that he would explain when appropriate.

3. **The Chairperson** thanked Mr. Kälin for his hard work and expressed the hope that the Committee would indeed approve the draft general comment at the current session. He suggested adopting the document paragraph by paragraph, with explanations being given by Mr. Kälin when necessary.

4. *It was so decided.*

Paragraph 1

5. *Paragraph 1 was adopted.*

Paragraph 2

6. **Ms. Wedgwood** suggested that the words "serve by" should be replaced with "serve as".

7. **Ms. Chanet** proposed that, in the French text, the words "*servent, par des moyens de procédure*" in the first sentence should be changed to "*contribuent, grâce à des moyens de procédure*".

8. *Paragraph 2, as amended, was adopted.*

Paragraph 3

9. **Mr. Iwasawa** recalled the Committee's discussion about whether article 14, paragraph 3, might apply to extradition proceedings and wondered if that should be taken into account in the draft general comment.

10. **Mr. Kälin** said his understanding of the outcome of the Committee's debate was that article 14, paragraph 3, did not apply directly to extradition proceedings and therefore paragraph 3 of the draft general comment was in line with the clear language of article 14. Paragraph 64 of the draft general comment referred to expulsion proceedings; that would be the place to decide whether or not to include discussion on extradition.

11. **Ms. Wedgwood** said that while she understood what Mr. Kälin meant by the reference to "determination of criminal charges" in the fifth sentence, she wondered whether there might be another way to express the idea, as it seemed to carry a different meaning in the draft general comment than in article 14, paragraph 3.

12. **Sir Nigel Rodley** suggested replacing the phrase concerned with "procedures relating to the preferment and determination of criminal charges" but pointed out that, in any case, paragraph 3 was only a general provision.

13. **The Chairperson** recalled the previous day's discussion of a communication, in which article 14 had been thought to apply to extradition proceedings in the case of manifest arbitrariness.

14. **Ms. Chanet** said that the problem lay in the way in which that article had been formulated. As clearly stated in the draft general comment, the guarantee of equality set out in the first sentence of article 14, paragraph 1, applied regardless of the nature of proceedings, meaning that extradition could be included. However, the second sentence entitled individuals to "a fair and public hearing by a competent, independent and impartial tribunal" only if they faced criminal charges or a civil suit, neither of which could apply to extradition. Had article 14 been better written, each of the guarantees would apply to all proceedings, including extradition proceedings. In future discussions on extradition, the Committee could decide whether it wished to change its interpretation of article 14; however, for the time being, she suggested adopting draft paragraph 3 as it stood.

15. **Mr. Kälin** agreed with Ms. Wedgwood that the language contained in paragraph 3 was problematic but said that the Committee should not attempt to resolve the extradition issue in that paragraph. He nonetheless suggested replacing the phrase "guarantees that are limited to procedures regarding the determination of criminal charges" with "guarantees available or protecting persons charged with a criminal offence" in keeping with the language used in article 14, thus providing a more open interpretation. He insisted that paragraph 3 of the draft general comment was merely a description of the structure of article 14; interpretation would come later.

16. *Paragraph 3, as amended, was adopted.*

Paragraph 4

17. **Ms. Wedgwood** suggested changing the expression "its guarantees" to "Covenant guarantees" for clarity's sake.

18. *Paragraph 4, as amended, was adopted.*

Paragraph 5

19. **Mr. Kälin** said that paragraphs 5, 6 and 7 served to reorganize the presentation of issues that had been somewhat muddled in the original general comment. Paragraph 5 now dealt with limitations to article 14 guarantees, paragraph 6 with derogations and paragraph 7 with reservations. Previously, there had been a text on limitations on article 14 guarantees stating that those guarantees could not be limited except where such limitations were specifically provided for. However, the Committee had realized that was too broad a statement. He had therefore tried to find a formulation that was general enough not to have to deal with all the aspects of limitation in paragraph 5.

20. **Ms. Chanet** expressed some reservations to the paragraph: the Committee should not seem to allow rights that were not provided for by the Covenant to be limited by law, as it could lead a State to consider that such limitations were normal and that it merely needed to justify their extent and proportionality.

21. **Mr. Amor** said he thought there was no reason to analyse limitations in paragraph 5 of the draft general comment and therefore suggested changing the paragraph to read: "*De nombreuses garanties telles que celles énoncées à l'article 14 ne peuvent être limitées.*" In addition, should the paragraph be adopted as it was, the accent on the "a" in the phrase "*le droit qu'à*" should be removed.

22. **Ms. Wedgwood** said that she would prefer the phrase "cannot be limited" to appear before the bracket in the first line of paragraph 5 in order to avoid juxtaposition of the words "limited" and "limitations". Furthermore, she found the expression "most of the rights of the accused" strange, as it seemed to go against the intention behind the whole paragraph, namely, to caution States against using emergencies to excuse procedural default. In addition, as article 4 of the Covenant did not refer to article 14, she feared the Committee was going beyond the scope of the Covenant, unless mention was made of general comment No. 29.

23. **Mr. Shearer**, referring to Ms. Chanet's point, suggested inserting a footnote reference to general comment No. 29 after the words "where permissible". Although it was not feasible to cover all possible situations in paragraph 5, there was clearly a right to derogate from the Covenant in times of emergency. In the last sentence, the definite article should be inserted before "right concerned".

24. **Sir Nigel Rodley** said he believed the Committee was arguing at cross purposes. His first impression had been that paragraph 5 was about derogations as per

general comment No. 29. In fact, however, the paragraph appeared to be stating that where there were provisions for limitations, they had to be stipulated by law, necessary and proportionate. It should be made clearer that the draft general comment was referring to actual limitations, such as the possibility of a trial being closed, in order to avoid misunderstandings. .

25. **Ms. Chanet** said that she remained concerned about drawing up general comments on such limitations. The Committee was not competent to set limitations on certain rights and not on others; where limitations existed, they were already identified in the text of the Covenant. She believed paragraph 5 was not in accordance with the Covenant and suggested deleting it entirely; each limitation would be reviewed where necessary in other paragraphs of the general comment.

26. **Ms. Wedgwood** stressed that the purpose of general comments was to make the Committee's jurisprudence widely available and that the distinction between limitations and derogations would not be easily understandable to the ordinary reader. It was also important to offer inspiration. For that reason, it might be better to start in a positive spirit and leave any mention of limitations and derogations to the end.

27. **Mr. Amor** said that the last part of paragraph 5 was unnecessary. The first part should be retained, but with adjustments, to include in particular a stipulation that the guarantees could not be limited unless so provided by the Covenant. However, the question then arose of whether there was any point in retaining the paragraph.

28. **The Chairperson** said that the two options before the Committee were either to spell out that where limitations were admissible they must be accompanied by the necessary guarantees or to discard the paragraph entirely.

29. **Mr. Kälin** recognized the difficulty of addressing the issue of limitations in just one paragraph, and in that connection agreed with Ms. Chanet's remarks. Moreover, the distinction between limitations and derogations could prove confusing for the ordinary reader. He proposed that the paragraph should be deleted.

30. *Paragraph 5 was deleted.*

Paragraph 6

31. **Mr. Kälin** said that in the English version of paragraph 6 the first sentence should be deleted, as it had been in the French and Spanish versions. He welcomed the insertion before the last sentence, under the additional proposals, of the words "Similarly, as article 7 is also non-derogable in its entirety, no evidence obtained through a violation of article 7 may be admitted in any proceedings covered by article 14, including during a state of emergency."

32. **Ms. Wedgwood** said that great care had to be taken in laying down exclusionary evidentiary rules. Article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment contained an important proviso as to the possibility of invoking a statement made as a result of torture; it made an exception where such a statement could be used against a person accused of torture as evidence that the statement had indeed been made. Such a proviso might usefully be included in the general comment under consideration. Moreover, the threshold for what constituted cruel, inhuman or degrading treatment should be low. She expressed concern that the Committee might be limiting the readiness of States parties to refer to treatment in such terms so as to ensure that statements obtained thereby would not be excluded as evidence. The wording of the proposed insertion should be modified in that light.

33. **Sir Nigel Rodley** agreed with Ms. Wedgwood that language based on that used in article 15 of the Convention against Torture would be useful in ensuring that the perpetrators of torture were not protected by the rule under discussion. While the Committee had traditionally held article 7 of the Covenant to have an exclusionary effect, its relevant case law was perhaps not altogether solid. The Committee's position, like that of the European Court of Human Rights, was that a person should not be sent to a country where he or she would be in danger of being subjected to cruel, inhuman or degrading treatment. He emphasized that the aim of the Committee's general comments was to clarify and confirm its traditional practice, not to change it, nor to put the Committee at odds with other treaty bodies.

34. **Ms. Wedgwood** said that if a Government sent a person to a country where there was a risk of such treatment, that Government might be said to have caused it. She noted that statements obtained under

torture or through cruel, inhuman or degrading treatment were not usually regarded as probative. The Committee's case law should be checked and any departure from it should only be made with full knowledge of what was entailed.

35. **Mr. Kälin** concurred with Ms. Wedgwood's proposal to include a reference to article 15 of the Convention against Torture. The language could be based on paragraphs 7 and 15 of general comment No. 29.

36. **Ms. Wedgwood** reminded the Committee that paragraph 15 of general comment No. 29 stated that "The provisions of the Covenant relating to procedural safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights." It was indisputable that protection against cruel, inhuman or degrading treatment was a non-derogable right.

37. **The Chairperson** said he took it that the Committee agreed to the insertion of the new sentence read out by Mr. Kälin and the inclusion of a reference to article 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

38. *Paragraph 6, as amended, was adopted.*

Paragraph 7

39. **Mr. Amor** said that, while he had no objection to the proposed paragraph 7, it might usefully be consolidated by the addition of the words "The Committee examines the validity of reservations to the provisions of the Covenant."

40. **Sir Nigel Rodley** said that he understood that Mr. Amor wished to refer indirectly to discussions with other treaty bodies. However, to do so might be misleading since the Committee had a general comment on reservations and it should not give the impression that it might be wishing to reconsider it. Mr. Amor's suggestion was factually correct, but that was perhaps not the place for it.

41. **Mr. Kälin** said that he agreed in substance with Mr. Amor but that paragraph 7 was not the appropriate place to take up that issue, which would make for an imbalance.

42. **Ms. Chanet** expressed concern that the proposed addition might lead to other reservations being also regarded as not acceptable.

43. **Sir Nigel Rodley** pointed out that the paragraph in question reproduced the wording of the last sentence in paragraph 8 of the Committee's general comment No. 24 on reservations.

44. **Mr. Amor** said that he would not insist on his suggestion.

45. **Mr. Kälin** proposed that the paragraph be kept unchanged except for the addition of a footnote referring to general comment No. 24.

46. *Paragraph 7, as amended, was adopted.*

Paragraph 8

47. **Mr. Amor** proposed that the words "and which therefore constitutes a judicial body" should be added at the end of paragraph 8.

48. **Ms. Wedgwood** raised concerns that the door might have been left open to the introduction in that paragraph of issues relating to arbitration. She proposed to avert that risk by amending the words "whenever domestic law entrusts a body with a judicial task" to read "whenever domestic law entrusts a publicly constituted body with a judicial task".

49. **Mr. Shearer** said that the word "judicial" would seem to exclude the possibility of arbitration. He conceded, however, that it might not be so in all countries or languages and therefore agreed to Ms. Wedgwood's proposed addition.

50. **Mr. Kälin** said that he understood the reference to domestic law to exclude arbitration clauses but could accept the addition of the words "publicly constituted".

51. **Ms. Palm** agreed with Ms. Wedgwood's proposal but said she was less sure about that made by Mr. Amor, since in some countries bodies that were not necessarily of a judicial character could be entrusted with judicial tasks.

52. **Mr. Bhagwati** observed that arbitration proceedings were part of judicial proceedings and that their inclusion was therefore in order. He was therefore not in favour of Ms. Wedgwood's amendment; however, he supported Mr. Amor's proposal.

53. **Mr. Kälin** said he was not convinced that "publicly constituted body" was the appropriate term; even a private body, for example, a bar association, could have authority under domestic law to undertake tasks of a judicial nature, such as imposing disciplinary measures, in which case article 14 would apply. Likewise, in some States traditional or customary conflict resolution mechanisms, while not necessarily publicly constituted, were entrusted under the law with judicial tasks and article 14 would also apply to them. The French translation of the text should be corrected, since it could be interpreted as implying that the paragraph could cover arbitration, which was not the case with the English text.

54. **Ms. Chanet** said that if domestic law included arbitration then article 14 would be applicable to such cases. However, in the interests of clarity, the words "*confiée par la loi nationale*" should be inserted in the second sentence of the French text, following "*tout organe exerçant une fonction juridictionnelle*".

55. **Ms. Wedgwood** said that the problem lay with the final clause of the paragraph, which could be interpreted too broadly as including arbitration. Deletion of the words "i.e. with the task of deciding a particular legal dispute between parties" would resolve the issue.

56. **Mr. Iwasawa** said he could support the text either as drafted or with the deletion suggested by Ms. Wedgwood. He shared Ms. Palm's concern about the addition suggested by Mr. Amor and pointed out that administrative committees, for example, were sometimes charged with settling disputes. With regard to the issue of arbitration, he recalled that the text referred only to the first sentence of article 14, paragraph 1, of the Covenant. The principle of equality also applied to arbitration.

57. **Mr. Sanchez-Cerro** said that decisions taken in private proceedings could nonetheless have public effects; arbitration and civil cases often involved tasks of a judicial nature. He believed the paragraph should be as general as possible and agreed that the last clause should be deleted.

58. **Ms. Wedgwood** said the notion of equality of arms was implied in article 14, paragraph 1, of the Covenant. In arbitration, however, the field was not always even for both parties. That was why she believed it was necessary to avoid any misunderstanding and delete the last clause of paragraph 8.

59. **Mr. Shearer** asked whether the reference to footnote 3 would be retained if that clause was deleted.

60. **Mr. Kälin** supported the deletion suggested by Ms. Wedgwood; footnote 3 would remain.

61. *Paragraph 8, as amended, was adopted.*

Paragraph 9

62. **Ms. Chanet** said that, in the last line of the paragraph, the word "judicial" should be deleted, because the text also applied to administrative proceedings. Furthermore, in the French text, the words "*ne fassent pas l'objet d'une discrimination*" should be replaced by "*ne fassent l'objet d'aucune discrimination*".

63. **Mr. Amor** said the word "*judiciaire*" in the last line of the French text referred to a specific type of proceeding and should be replaced by "*juridictionnelle*".

64. **Ms. Chanet** remarked that the word "*juridictionnelle*" could also be interpreted as excluding administrative proceedings.

65. **Sir Nigel Rodley** suggested that the words "judicial proceedings" could be deleted and replaced by "to the proceeding in question", given that the type of proceeding had been defined in paragraph 8.

66. **Mr. Kälin** suggested that the word "any" should be inserted before "discrimination".

67. *Paragraph 9, as amended, was adopted.*

Paragraph 10

68. **Mr. Kälin** said the third sentence had been added to specifically take into account the situation of migrants, refugees and displaced persons. A reference had been inserted in the seventh sentence to explicitly mention de jure and de facto access to the courts. The Chairperson of the Committee on the Rights of the Child had suggested the inclusion of a specific reference to children suffering from HIV/AIDS and children and orphans outside their country of origin. He himself would prefer a briefer reference to the situation of children.

69. **Sir Nigel Rodley** said he was not sure that a reference to children should be added. If it was, he felt

it would be more appropriate in the third sentence than in the last, which seemed to highlight displaced persons.

70. **Ms. Wedgwood** said the Committee's general comments should deal with principles of law; the last sentence, by referring to reports of States parties, seemed to detract from the authority of paragraph 10. If the sentence was retained a reference such as "under the Covenant" should be inserted following "States parties". She wondered if it served any purpose to reiterate the principle of equality of access in the first sentence, given that the purpose of a general comment should be to explain and develop the interpretation of the Covenant. She was also concerned that the scope of the last part of the third sentence, relating to the right of access to a State party's tribunals by individuals no longer in the territory of that State party but who wished to return to it, was too broad. Many States required at least one of the parties to a proceeding to be a citizen or resident.

71. **Mr. Shearer** agreed that the last sentence detracted from the paragraph and suggested it should be deleted. He also shared the concerns expressed by Ms. Wedgwood with regard to the third sentence. Regarding the first sentence, he felt the text should be reformulated to refer to the "very right of access to the courts itself".

72. **Ms. Chanet** said that although the Committee had always upheld the right of an individual to have access to the judicial system of the territory in which he was located, implying that individuals not in the territory of a State had a right of access to that State's judicial system was going too far.

73. **Ms. Palm** agreed that implying such a right of access was going too far and also supported the deletion of the last sentence.

74. **Mr. Kälin** suggested that: in the first sentence, the words "right of" should be inserted following "very" in the first sentence; in the third sentence, the words "or who want to return to such State" should be deleted, and the words "and unaccompanied children" should be inserted following the words "migrant workers"; and the last sentence should be deleted.

75. *Paragraph 10, as amended, was adopted.*

Paragraph 11

76. *Paragraph 11 was adopted.*

Paragraph 12

77. **Ms. Chanet** suggested that the adjective "judicial" qualifying "proceedings" should be deleted, in order to make the text more general, as the Committee had done in previous paragraphs.

78. **Mr. Kälin** said the paragraph had been included as a result of communication No. 779/1997, *Äärelä and Näkkäläjärvi v. Finland*, in respect of which the Committee had found that "a rigid duty under law to award costs to a winning party may have a deterrent effect on the ability of persons who allege their rights under the Covenant have been violated to pursue a remedy before the courts". The second sentence supported and explained the first. He believed the paragraph should be retained as written, subject to the amendment suggested by Ms. Chanet.

79. **Mr. Amor** said he would prefer to include some reference to the State assuming responsibility for all or part of any costs awarded. He would draft an alternative text for submission to the rapporteur.

80. **The Chairperson** said he took it that the Committee wished to defer further consideration of paragraph 12.

81. *It was so decided.*

Paragraph 13

82. **Mr. Kälin** said that, although the text of paragraph 13 had been adopted on first reading, uncertainties remained over its placement within the draft general comment as a whole. Some Committee members had felt that the paragraph should be incorporated into the section of the draft dealing with article 14, paragraph 5, of the Covenant. In his view, however, it should remain in its current location because its contents exceeded the scope of article 14, paragraph 5.

83. **Sir Nigel Rodley**, supported by **Mr. Shearer**, asked whether paragraph 13 had a purpose other than reiterating the effect of article 14, paragraph 5, of the Covenant.

84. **The Chairperson** stressed the importance of making affirmative, rather than negative, statements about the rights deriving from the Covenant.

85. **Ms. Chanet** agreed, pointing out that paragraph 13 referred to two distinct rights, one negative and one positive.

86. **Mr. Kälin**, responding to the query raised by Sir Nigel Rodley, recalled that the Committee had received several communications from individuals alleging violations of article 14, paragraph 1, on the ground that they had been denied access to the constitutional courts. Paragraph 13 was intended to make it clear that, while article 14, paragraph 1, of the Covenant did not entail a right to bring an appeal before all higher courts, the rights enshrined in article 14, paragraph 5, of the Covenant were still valid.

87. **Sir Nigel Rodley** suggested rephrasing the first part of paragraph 13 to read: "The right to equal access to a court, embodied in article 14, paragraph 1, includes the right to an appeal consistent with article 14, paragraph 5".

88. During its consideration of a number of communications relating to the death penalty, the Committee had taken the view that convicted persons had the right to lodge constitutional appeals; such cases might, however, fall within the scope of article 2 rather than article 14.

89. **Mr. Shearer** suggested rewording the first part of the sentence to read: "The right to equal access to a court, embodied in article 14, paragraph 1, does not entail a right to an appeal to an instance beyond the instance at which the conviction and sentence were reviewed."

90. **Ms. Chanet** enquired as to the exact wording of the relevant passage of the Committee's Views on communication No. 450/1991, *I.P. v. Finland*.

91. **Mr. Kälin** said that paragraph 13 did not refer only to criminal proceedings. It began by stipulating that article 14, paragraph 1, could not be invoked as grounds for obtaining the right of appeal to a higher instance in civil cases, and then went on to refer to other possible remedies.

92. In *I.P. v. Finland*, the author had filed a complaint against the national tax authorities with a view to bringing criminal proceedings. Having been denied the opportunity to bring such proceedings, he had also been denied the opportunity to appeal. In that connection, the Committee had stated: "As for the author's claim that he was denied the possibility of appeal, even where these matters do fall within the scope *rationae materiae* of article 14, the right to appeal relates to a criminal charge which is not here in issue. This part of the communication is therefore inadmissible under article 3." Perhaps it was already clear that the right to equal access to a court did not automatically entail a right to appeal at every level; in that case, the entire paragraph should be deleted.

93. **Mr. Amor** said that he was not in favour of deleting the whole paragraph.

94. **The Chairperson** expressed concern that paragraph 13 addressed two separate issues. It first spoke in general terms about the right of access to a court, enshrined in article 14, paragraph 1. However, it then referred to the specific right of appeal embodied in article 14, paragraph 5, which applied only to criminal cases.

95. **Ms. Chanet**, referring to the French version of the draft, suggested rewording the paragraph to read: "*Le droit à l'égalité d'accès à un tribunal, énoncé au paragraphe 1 de l'article 14, ne garantiet pas, en dehors d'autres droits garantis par le Pacte, un droit à une voie de recours.*"

96. **Mr. Kälin** said that, while Ms. Chanet's proposal would work in French and Spanish, he had yet to find a satisfactory equivalent in English. He suggested, however, that the paragraph might be simplified to read: "The right to equal access to a court concerns access to the first instance and does not deal with the appeals level."

97. **The Chairperson** stressed the importance of retaining a reference to article 14, paragraph 1, of the Covenant.

98. *Article 13, as amended, and subject to further minor drafting changes, was adopted.*

Paragraph 14

99. **Ms. Wedgwood** said that the specific reference to *Robinson v. Jamaica* might detract from the timeless nature of the draft general comment. She also pointed out that equality of arms was an extremely complex notion, and that the question of whether or not States were obliged to provide financial support to ensure that disadvantaged parties could bring suit in civil, as well as criminal, cases had not yet been settled.

100. **Ms. Chanet** said that the legal concepts underpinning paragraph 14 should not be diluted with references to specifics, namely the case of *Robinson v. Jamaica*. The third sentence should therefore be couched in more general terms. Furthermore, while the

penultimate sentence of the French text of paragraph 14 dealt with civil cases, the final sentence of that text, which referred to "*les témoins cités pour sa défense*", appeared to refer once again to criminal proceedings. Lastly, she proposed the addition of wording to clarify the concept of equality of arms in civil cases.

101. **Mr. Amor** proposed deleting the words "involved in judicial proceedings" from the second sentence, in keeping with the wording used in paragraphs 9 and 12.

102. **Mr. Kälin** said that the exceptional nature of *Robinson v. Jamaica* made it very difficult to refer to that case in general terms. He therefore proposed deleting the second half of the third sentence (from "or if the trial judge" to "unavailable or not ready").

103. In response to the issues raised by Ms. Chanet, he said that the French phrase "*cités pour sa défense*" did not appear in the English text. It should therefore be deleted. While he agreed that the concept of equality of arms stemmed from criminal law and did not necessarily apply, as such, to civil proceedings, the Committee's own jurisprudence made it clear that all parties to a civil case had the same procedural rights. Paragraph 14 should therefore reflect that state of affairs.

104. **Mr. Iwasawa** expressed his support for a reference to civil proceedings. However, the last sentence of paragraph 14 was problematic, since obliging a State party to provide the services of an interpreter, free of charge, in civil as well as criminal proceedings exceeded the scope of article 14 of the Covenant.

105. **The Chairperson**, referring to the fourth sentence of paragraph 14, suggested replacing the phrase "Equality of arms" with the words "Equality between the parties". He was unsure whether article 14 of the Covenant could be taken to mean that States parties must provide the free assistance of an interpreter, where necessary, in all types of cases.

106. **Ms. Chanet** said that article 14, paragraph 1, of the Covenant referred simply to the equality of all persons before the courts and tribunals, a concept that applied to civil, as well as criminal, cases. However, States parties were not obliged to provide the services of an interpreter in all civil cases, particularly since many such cases consisted only of written proceedings. That obligation could be invoked only when the defendant was required to appear in person. She wondered whether the draft general comment should reflect that situation.

107. **Mr. Kälin** agreed that the principle of equality between the parties applied to civil, as well as criminal, proceedings. Free legal assistance was a thorny issue: in some countries where members of certain social and/or ethnic minorities were unable to understand the official language used by the courts, the assistance of an interpreter was necessary to uphold the principle of equal treatment. He proposed amending the final sentence of paragraph 14 to read: "In exceptional cases, it also might require the free assistance of an interpreter."

108. *Paragraph 14, as amended, was adopted.*

The meeting rose at 1 p.m.